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In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MANHATTAN CORPORATION,
MANHATTAN GUEST HOUSE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, in adopting and applying a uniform rule that ballots marked only on the back shall be deemed void, the National Labor Relations Board reasonably exercised its wide discretion to establish procedures for conducting representation elections.

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MANHATTAN CORPORATION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–7a) is reported at 620 F.2d 53. The decision and order of the National Labor Relations Board (App. C, *infra*, 10a–21a) are reported at 242 N.L.R.B. No. 156. The Board's decision and certification of representative (App. D, *infra*, 22a–25a) in the underlying representation proceeding are reported at 240 N.L.R.B. 272. The Acting Regional Director's report on objections and challenged ballots (App. E, *infra*, 26a–31a) in that proceeding is unreported.

JURISDICTION

The judgment of the court of appeals (App. F, *infra*, 32a) was entered on June 23, 1980. The Board's timely petition

for rehearing was denied on October 28, 1980 (App. B, *infra*, 8a–9a). Pursuant to extensions granted by Justice Powell, the time for filing a petition for a writ of certiorari has been extended to and including March 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 9 of the National Labor Relations Act, 29 U.S.C. 159, provides in relevant part:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment* * * .
>
> * * * * *
>
> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> > (A) by an employee or group of employees or any individual or labor organizaton acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a),
>
> * * * * *

> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

1. In June 1978, pursuant to a representation petition filed under Section 9(c)(1) of the National Labor Relations Act, 29 U.S.C. 159(c)(1), by the Service Employees International Union, Local No. 275, AFL-CIO ("the Union"), the National Labor Relations Board conducted an election by secret ballot among the employees of Manhattan Corporation, Manhattan Guest House, Inc. ("the Nursing Home"). The tally of ballots showed 43 votes for the Union and 42 votes against; Board agents rejected as void three other ballots (App. E, *infra*, 26a).[1] Two of the voided ballots had no markings on their printed face, but were marked with an "X" on the blank reverse side positioned so that the "X" appeared behind the "NO" square on the face of the ballots. The third ballot also bore no facial markings, but the word "NO" was written on the blank reverse side (App. D, *infra*, 22a, 24a).[2]

The Nursing Home filed objections to the conduct of the election, alleging, among other things, that the Board's agents had erred in voiding the three back-marked ballots. After conducting an administrative investigation, the Board's Acting Regional Director issued a report recom-

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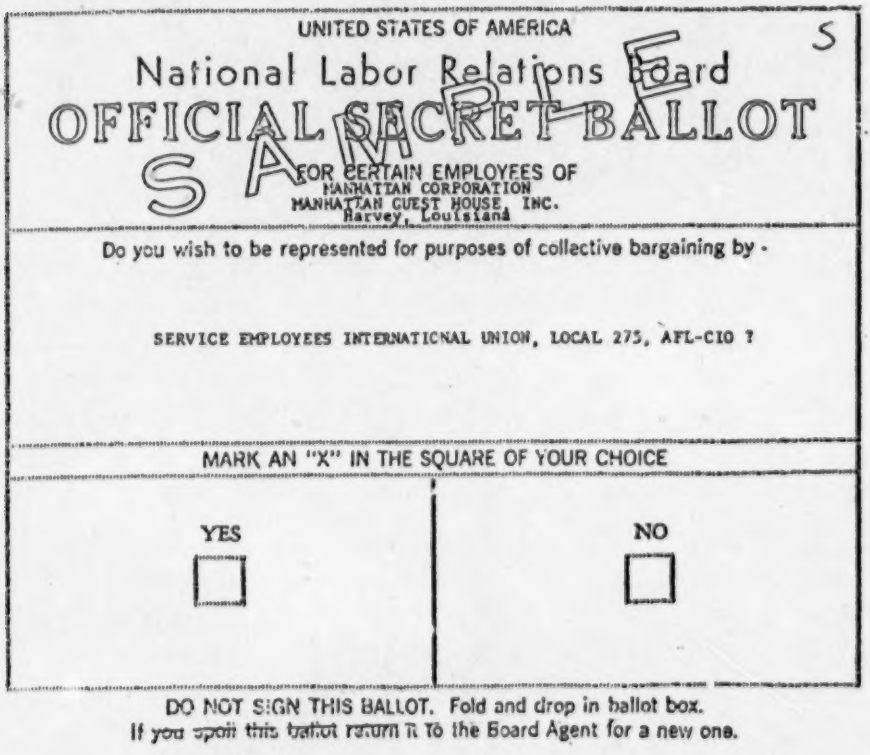
[1] Additionally, five ballots were cast subject to the Nursing Home's challenge. The Board's Acting Regional Director subsequently sustained two of the challenges on the merits and three in accordance with a stipulation entered into by the Nursing Home and the Union (App E, *infra*, 27a–28a & n.1); that disposition was not challenged by any party in the court of appeals (App. A, *infra*, 1a).

[2] The ballot employed in this case followed the standard Board form for elections in which voters have a yes-or-no choice respecting representaton by a single labor organization (C.A. Vol. of Pleadings 6):

mending that the Nursing Home's objections be overruled, relying on *Columbus Nursing Home, Inc.*, 188 N.L.R.B. 825, 826 (1971), wherein the Board reaffirmed its longstanding policy of voiding ballots marked only on the back (App. E, *infra*, 28a–30a). The Nursing Home filed exceptions to that report and, by a divided vote, the Board sustained the Acting Regional Director's recommendations and certified the Union as the representative of the Nursing Home's employees (App. D, *infra*, 22a–25a).[3]



UNITED STATES OF AMERICA

S

National Labor Relations Board

SAMPLE

OFFICIAL SECRET BALLOT

FOR CERTAIN EMPLOYEES OF
MANHATTAN CORPORATION
MANHATTAN GUEST HOUSE, INC.
Harvey, Louisiana

Do you wish to be represented for purposes of collective bargaining by -

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 275, AFL-CIO ?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES ☐ NO ☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

Pursuant to the *National Labor Relations Board Casehandling Manual—Part Two: Representation Proceedings* ¶ *11314 (1975)*, copies of the Board's standard "Notice of Election"—bearing an enlarged facsimile of this ballot—were posted on the Home's premises prior to the election (App. E, *infra*, 30a & n.2).

[3] Board Member Murphy, dissenting in part, would have counted the ballot marked "NO" on the blank reverse side, but agreed with the majority's disposition of the other two ballots (App. D, *infra*, 25a).

Shortly thereafter, the Union asked the Nursing Home to commence collective bargaining and the Home refused, contesting the validity of the Union's certification. Upon charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Home's refusal to bargain violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). The Board, on summary judgment, found the complaint meritorious and issued a bargaining order (App. C, *infra*, 10a–21a.)

2. The court of appeals denied enforcement of the Board's order. Relying on its decision in *NLRB* v. *Titche-Goettinger Co.*, 433 F.2d 1045 (1970), the court held that the Board's practice of voiding back-marked ballots is inconsistent with the Board's general policy of attempting to effectuate unambiguous voter intent (App. A, *infra*, 2a–3a).[4] The court observed that the election in the instant case involved a single labor organization and that the ballot at issue thus presented "a simple yes-or-no choice" (*id.* at 2a). Therefore, reasoned the court, since one of the ballots in question "'unmistakably show[s] an unambiguous, legible "NO," albeit * * * on the blank side of the form[,] * * * [t]he intent to reject union representation is clear'" and the vote "'should have been recorded for the [Nursing Home]'" (*id.* at 3a; citation omitted).[5]

In a separate opinion, Judge Tate concurred "[u]nder compulsion of" the *Titche-Goettinger* decision, but stated that he "strongly disagree[d]" with the court's "arbitrary judicial substitution of judgment as to the Board's manner of conducting elections and counting paper ballots" (App. A, *infra*, 3a, 4a). Challenging the court's assertion that the Board's

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[4]The court noted that two other circuits had reached the same conclusion. See *NLRB* v. *Wrape Forest Industries, Inc.*, 596 F.2d 817 (8th Cir. 1979); *Roberts Door and Window Co.* v. *NLRB*, 540 F.2d 350 (8th Cir. 1976); *NLRB* v. *Tobacco Processors, Inc.*, 456 F.2d 248 (4th Cir. 1972).

[5]Because the counting of that ballot as a "NO" vote was sufficient to deprive the Union of its one-vote majority, the court found it unnecessary to consider the validity of the other two voided ballots.

rule voiding back-marked ballots is inconsistent with its "effort of giving effect to the unambiguous intent of the voter," Judge Tate suggested that back-marked ballots "raise doubts 'whether [the voter] was even aware of the instructions, or indeed, of the choices set forth on the face of the ballot'" (*id.* at 4a–5a, 6a; citation omitted). In addition, Judge Tate observed that the Board's rule promotes the expeditious resolution of representation questions and preserves election secrecy, which could be subverted by counting ballots that may have been marked in an aberrational manner to "'insure that one of the parties to the election finds out how [the employee] voted'" (*id.* at 5a–6a; citation omitted).

REASONS FOR GRANTING THE PETITION

The decision below constitutes a serious departure from well-established principles respecting the Board's authority to fashion rules governing the conduct of representation elections and the limited role of courts in reviewing such matters. As this Court repeatedly has observed, Congress has "entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946); accord, *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 (1969); *NLRB* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226 (1940). The function of reviewing courts with respect to the Board's administration of representation elections is therefore confined to guarding against arbitrary or capricious action by the Board. See, *e.g.*, *NLRB* v. *Mattison Machine Works*, 365 U.S. 123 (1961); see also *NLRB* v. *Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2d Cir. 1970), cert. denied, 401 U.S. 954 (1971) ("The conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse.").

As shown below, the Board's rule voiding back-marked ballots does not constitute "an unreasonable or unprincipled

construction of the statute." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). Moreover, the court's rejection of that rule significantly intrudes upon the functions reserved to the Board by Congress. Compare *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978) (regulatory agencies are "'in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry [they regulate] and the tasks of the agency involved'") (quoting *FCC* v. *Schrieber*, 381 U.S. 279, 290 (1965)). Corrective action by the Court is therefore warranted.

1. Drawing from its vast experience in conducting representation elections under Section 9(c) of the Act, 29 U.S.C. 159(c),[6] the Board has, over the course of 45 years, developed a set of rules governing the validity of irregularly-marked ballots. As with the Board's regulations respecting challenges to voter eligibility (see *NLRB* v. *A.J. Tower Co.*, *supra*, 329 U.S. at 325–326), these ballot rules necessarily reflect a "practical adjustment[ ]" of the guiding principle of majority rule to the sometimes countervailing statutory interests in promoting the "accurate[ ], efficient[ ] and speed[y]" resolution of representation questions, and in preserving "the secrecy of the ballot" (*id.* at 331). It has been held that these countervailing interests would, of themselves, justify a general rule eschewing *any* attempt to determine voter intent with respect to ballots not marked in strict conformity to the instructions thereon. *NLRB* v. *Whitinsville Spinning Ring Co.*, 199 F.2d 585, 588 (1st Cir. 1952); compare *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 608 (1969) (rejecting "any rule that requires a probe of an employee's subjective motivations" in signing a showing-of-interest card as "involving an endless and unreliable inquiry"). The Board, however, regards such an approach as unacceptably costly to the principle of majority rule (see

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[6] For example, in Fiscal Year 1979 alone the Board conducted 8,177 such elections. *Forty-Fourth Annual Report of the National Labor Relations Board* 289 (1979).

Luntz Iron & Steel Co., 97 N.L.R.B. 909 (1951)), and has therefore adopted a policy of treating irregularly-marked ballots as valid so long as the markings in question clearly and unambiguously indicate voter intent[7] and do not inherently identify the voter[8] or constitute such a radical departure from the usual manner in which voters mark ballots as to create the possibility that they are identifying marks.[9]

The Board has concluded that ballots marked only on the back meet neither of those requirements.[10] In light of the "clear instructions [on Board ballots] to 'mark an X in the square of your choice'" (*Columbus Nursing Home, Inc.*, 188 N.L.R.B. 825 (1971)), when a ballot contains no markings on its face "any conclusion drawn about the voter's intent based on markings on the back of a ballot must be almost entirely speculative * * *, [for] whether [the voter in question] was

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[7] Compare, *e.g.*, *Knapp-Sherrill Co.*, 171 N.L.R.B. 1547, 1548 (1968) (counting ballot marked with "X" in "NO" box and with derogatory remark about union written in "YES" box), and *Bridgeton Transit*, 124 N.L.R.B. 1047, 1048 (1959) (counting ballot marked with check-mark rather than "X"), with *Leonard Creations of California, Inc.*, 243 N.L.R.B. No. 130 (1979) (voiding ballot marked with "Y" in "YES" box and "X" in "NO" box), enforcement denied, 638 F.2d 111 (9th Cir. 1981), and *Caribe Industrial and Electrical Supply, Inc.*, 216 N.L.R.B. 168, 169 (1975) (voiding ballot marked with single vertical line in "NO" box and "X" in "YES" box).

[8] See, *e.g.*, *Burlington Mills Corp.*, 56 N.L.R.B. 365, 367–368 (1944) (voiding ballots bearing signatures of voters).

[9] Compare, *e.g.*, *NLRB* v. *Martz Chevrolet, Inc.*, 505 F.2d 968, 969,971 (7th Cir. 1974) (counting ballot marked with "X" in "YES" box and words "Do I ever" written on face of ballot; aberrational marking "merely emphasized [the voter's] approval of the [u]nion"), with *Ebco Manufacturing Co.*, 88 N.L.R.B. 983, 984–985 (1950) (voiding ballot marked with "X" in "NO" box and circled "R" written on face of ballot; mark might "serve to reveal the identity of the voter").

[10] The Board first fully articulated that conclusion in *Columbus Nursing Home, Inc.*, 188 N.L.R.B. 825 (1971). However, the Board's policy of voiding ballots marked only on the back was first applied in *Western Electric Co.*, 97 N.L.R.B. 933 (1951), and has been consistently adhered to ever since. In 1978, the Board carefully reexamined the policy and its rationale and reaffirmed the *Western Electric Co.* rule in *Staco, Inc.*, 234 N.L.R.B. 593 (1978).

even aware of the instructions, or, indeed, of the choices set forth on the face of the ballot, are matters known only to him" (*ibid.*). We therefore take issue with the statement below (App. A, *infra*, 3a) that the intent of a ballot marked "NO" on the back is unambiguous in a one-union election because the only question asked on the ballot's face is "Do you wish to be represented for purposes of collective bargaining by [the Union]". For unlike irregular markings on the front of a ballot, which may be given context by the question posed thereon, markings on the back of a ballot are devoid of context and cannot conclusively be said to relate to any particular question. Although the "NO" written on the back of the disputed ballot in the instant case could be read as a vote against representation by the Union, it could also fairly be interpreted as indicating dissatisfaction on the part of the voter with *both* choices—that is, his present lot *and* the prospect of unionization—or as demonstrating disdain for the election process itself. The Board's refusal to count back-marked ballots therefore eliminates "endless and unreliable" speculation into "actual" voter intent (*NLRB* v. *Gissel Packing Co.*, *supra*, 395 U.S. at 608) which otherwise would necessarily occur.

Furthermore, as the Board explained in *Columbus Nursing Home, Inc.*, *supra*, 188 N.L.R.B. at 826, "ballots cast in a manner at such variance with the norm always create the possibility that the voter intended to insure that one of the parties to the election finds out how he voted. * * * A device which can so easily be used to destroy the secrecy of representation elections and lend encouragement to fraud, bribery, or corruption cannot be sanctioned by the Board."[11]

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[11] The Board's determination that back-marked ballots are uniquely susceptible to such abuse makes sense. Because ballots are folded face-inward before they are deposited in the ballot box, irregular markings that appear on the face will not generally be visible to others at the polling place, whereas back-markings may be readily apparent. Moreover, as the ballots are inspected upon counting, markings on the blank reverse side may be more conspicuous than irregularities on the front, in light of the extensive printing that appears on the ballot face (see note 2, *supra*). Finally, back markings are more likely to be

The Board's rule against counting back-marked ballots therefore represents a reasoned application of its general policy with respect to irregularly-marked ballots and an effort to achieve the principled "practical adjustment[ ]" of competing statutory interests explicitly sanctioned by this Court in *NLRB* v. *A.J. Tower Co.*, *supra*, 329 U.S. at 331. Accordingly, the court below had no license to reject the rule "merely because the courts might prefer another view * * *." *Ford Motor Co.* v. *NLRB*, *supra*, 441 U.S. at 497. For even if it is assumed, *arguendo*, that the voter here made a clear and unambiguous statement of intent, as Judge Tate observed in his concurring opinion (App. A, *infra*, 5a–6a), there are other "pragmatic and philosophical values"—preserving the secrecy of the ballot, foreclosing litigation over permissible back-markings, and promoting decisional uniformity—that are served by the Board's adherence to its rule.[12] The Board is not bound to give effect to expressions of voter intent, however at odds with its ballot regulations—any more than it is bound to accept meritorious challenges to voter eligibility, however untimely—if to do so would:

> invade the secrecy of the ballot, destroy the finality of the election result, invite unwarranted and dilatory

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deliberate—given the explicit instruction on the face of the ballot to "mark an 'X' in the square of your choice" (*ibid.*)—and are therefore more likely to constitute an attempt at voter identification than irregular front-markings that appear, for example, to be due simply to inadvertence or a change of decision (*J.L.P. Vending Co.*, 218 N.L.R.B. 794 (1975)), or an effort to give greater emphasis to the voter's choice (*NLRB v. Martz Chevrolet, Inc.*, *supra*, 505 F.2d at 971). This distinction is entirely consistent with the Board's policy, discussed at page 8 and notes 8–9, *supra*, of invalidating ballots bearing irregular front-markings where the markings in question appear to have been made in a deliberate attempt at voter identification.

[12] As Judge Tate observed (App. A, *infra*, 5a):

> America's long experience with the use of paper ballots in state elections indicates the value of simple and sometimes somewhat arbitrary rules as to what is and what is not a valid ballot. Too great flexibility in these requirements leads to applications as variable as the different commissioners at the different elections, as well as to election disputes following every close election.

> claims by defeated candidates and "keep perpetually before the courts the same excitements, strifes, and animosities which characterize the hustings, and which ought, for the peace of the community, and the safety and stability of our institutions, to terminate with the close of the polls."

NLRB v. *A.J. Tower Co.*, *supra*, 329 U.S. at 331–332 (citation omitted). The Board has concluded that precisely these dangers attend a rule permitting voters to express their preference "in a manner so radically different from the normal method of marking ballots." *Columbus Nursing Home, Inc.*, 188 N.L.R.B. 825 (1971). That conclusion is, to say the least, "reasonably defensible"; the court below therefore erred in rejecting it. *Ford Motor Co.* v. *NLRB*, *supra*, 441 U.S. at 497; accord, *NLRB* v. *A.J. Tower Co.*, *supra*, 329 U.S. at 331–334.

2. Although the Board's rule on back-marked ballots has been rejected by the three Circuits that have had occasion to pass on it,[13] as we have shown, the rule constitutes a reasonable exercise of the Board's wide discretion to establish procedures for the conduct of representation elections. In these circumstances, only corrective action by this Court can restore the Board's ability to apply that rule in those Circuits, and can remove the uncertainty which is likely to prompt further litigation as to the validity of the rule—to which the Board has consistenly adhered for thirty years—in other Circuits.[14]

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[13] See note 4, *supra*. The Board's view has not, however, been without judicial support. In addition to Judge Tate's concurring opinion in this case, see *NLRB* v. *Wrape Forest Industries, Inc.*, *supra*, 596 F.2d at 819–822 (Lay and Heaney, JJ., dissenting), and *Roberts Door and Window Co.* v. *NLRB*, *supra*, 540 F.2d at 353 (Heaney, J., dissenting).

[14] Moreover, a reversal in this case might check the increasing propensity on the part of some courts of appeals to "second-guess" the Board on other ballot questions as well. See, *e.g.*, *NLRB* v. *Leonard Creations of California, Inc.*, 638 F.2d 111 (9th Cir. 1981) (requiring Board to count as vote against union representation ballot marked with "Y" in "YES" box and "X" in "NO" box).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
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MARCH 1981

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 79–2983.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MANHATTAN CORPORATION,
MANHATTAN GUEST HOUSE, INC.,
RESPONDENT

June 23, 1980.

Before TUTTLE, RANDALL and TATE, *Circuit Judges*.

RANDALL, *Circuit Judge:*

This case is before us on the application of the National Labor Relations Board (the Board) for enforcement of its order that Respondent, the Manhattan Corporation, Manhattan Guest House, Inc., (the Home), cease and desist from refusing to bargain collectively with the Service Employees International Union, Local No. 275, AFL-CIO (the Union).

On June 23, 1978, a representation election was held on the Home's premises. Ballots were cast by 93 of the approximately 106 eligible voters. Of the 93 ballots cast, 43 were votes for representation by the Union; 42 were votes against representation; 5 were challenged ballots; and 3 were declared void by the Board. The challenges to the five ballots have been sustained at an earlier stage in these proceedings, and those challenges are not before us on appeal. The only issue on appeal is the validity of the three voided ballots.

The Home contends that all three voided ballots clearly express the intent to vote against representation by the Un-

ion. Because the margin of the Union's victory was one, if any one of the voided ballots is counted as a vote against representation, the Union failed to receive a majority of the votes cast, and enforcement of the Board's bargaining order must be denied.

All three of the voided ballots were marked only on the back of the ballot. On the face of the ballot appears the question:

> Do you wish to be represented for purposes of collective bargaining by
>
> SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 275, AFL-CIO?

Below the question there is a square under the word "YES" on the left side of the ballot, and one under the word "NO" on the right side of the ballot. The ballot directs the voter to "MARK AN 'X' IN THE SQUARE OF YOUR CHOICE."

The voters casting two of the voided ballots marked their respective X's on the back of their ballots. The X's appear on the "NO" side of the ballots. The third voided ballot contains only the word "No" written on the back of the ballot. We hold that the ballot with the word "No" written on the back should not have been voided, but should have been counted as a vote against representation by the Union. Because that ballot is enough to affect the outcome of the election, we do not consider whether the Board properly voided the other two ballots.

In *NLRB v. Titche-Goettinger Co.*, 433 F.2d 1045 (5th Cir. 1970), we held that ballots containing no markings on their faces, but only the word "No" on their backs, were not void, but should be counted as votes against representation. The ballots at issue in *Titche-Goettinger* were apparently identical to the ones at issue here. Like this election, the *Titche-Goettinger* election involved only one union, and thus the ballots presented a simple yes-or-no choice. In *Titche-Goettinger* we said:

> General Counsel for the Board contends that the Acting Regional Director properly determined that "the marking on the ballot on the reverse side is too radical a de-

> parture from the accepted norm in marking ballots to permit conjecture as to the voters' intent." Such a conclusion is hardly consistent with the admitted Board policy of attempting to give effect to the voters' intent whenever possible. See *Western Electric Company, Incorporated*, 97 N.L.R.B. 933; *N.L.R.B. v. Whitinsville Spinning Ring Co.*, 1 Cir. 1952, 199 F.2d 585.
>
> The three contested ballots unmistakably show an unambiguous, legible "NO," albeit its appearance on the blank side of the form. Additionally, as already indicated, 2 of the voters whose ballots were voided voluntarily submitted affidavits to the Regional Director, declaring their intention to vote against the Union. The intent to reject union representation is clear, considering that the only question asked on the ballot is, "Do you wish to be represented for purposes of collective bargaining by RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO." Accordingly, the 3 votes should have been recorded for the Employer.

433 F.2d at 1048. We are bound by *Titche-Goettinger* to deny enforcement.

We note that two other circuits apply the rule to which we adhere today. See *NLRB v. Wrape Forest Indus.*, 596 F.2d 817 (8th Cir. 1979); *Roberts Door & Window Co. v. NLRB*, 540 F.2d 350 (8th Cir. 1976); *NLRB v. Tobacco Processors, Inc.* 456 F.2d 248 (4th Cir. 1972) (citing *Titche-Goettinger*).

ENFORCEMENT DENIED.

TATE, *Circuit Judge*, concurring:

Under compulsion of our decision in *National Labor Relations Board v. Titche-Goettinger*, 433 F.2d 1045 (5th Cir. 1970), I concur in our panel holding that the Board may not disallow a ballot on which no choice was marked on the ballot itself, but in which a "No" was marked on the *back* of the paper ballot. The decision so held, on the ground that such disallowance "is hardly consistent with the admitted Board policy of attempting to give effect to the voters' intent whenever possible." 433 F.2d 1048.

For the benefit of possible en banc consideration, I must strongly disagree with this judicial interpretation of Board

policy and with our arbitrary judicial substitution of judgment as to the Board's manner of conducting elections and counting paper ballots.

In the first place, the Board's policy in not invalidating ballots because of irregular markings on the face of the ballot (a "Si" instead of a "Yes", for instance) in the space where the vote is supposed to be recorded,[1] in an effort of giving effect to the unambiguous intent of the voter, is *not*

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[1] Quoting from the Board's brief:

> Thus, it is the Board's policy to count ballots which are irregularly marked "whenever the intent of the voter [is] clearly apparent" so long as "the ballot is not marked in such a way as to give evidence of voter identification or an attempt at voter identification." *N.L.R.B.* v. *Whitinsville Spinning Ring Co., supra,* 199 F.2d at 587 and 588; *N.L.R.B.* v. *Sauk Valley Manufacturing Co.,* 486 F.2d 1127, 1133 (9th Cir. 1973); *Columbus Nursing Home, Inc.,* 188 NLRB 825, 826 (1971). For instance, the Board has counted ballots where the voter, instead of using the conventional "X", has indicated his choice by using such marks as a check mark or a series of pen lines, or words which either alone or in conjunction with other markings on the ballot written in or around the appropriate ballot square, clearly indicate what the voter meant. [See, *Gregg Moore Co.,* 178 NLRB 483, 484 (1969); *Knapp Sherill Co.,* 171 NLRB 1547, 1548 (1968); *Bridgeton Transit Co.,* 124 NLRB 1047, 1048 (1959).] The Board also will count ballots on which there are markings for more than one choice but on which an attempt has clearly been made to eradicate the markings for all choices but one. [*J.L.P. Vending Co., Inc.,* 218 NLRB 794, 795 (1975); *Gifford-Hill & Co., Inc.,* 181 NLRB 729 (1970); *N.L.R.B.* v. *Schapiro and Whitehouse, Inc.,* 356 F.2d 675, 677–678 (4th Cir. 1966).] In such situations, the voter's intent is free from ambiguity and the irregular markings appear to be due to inadvertence, indecision, or an intent to give greater emphasis to the voter's choice, and thus, are not likely to be attempts at identification. See *George K. Garrett Co.,* 120 NLRB 484, 486 (1958); *N.L.R.B.* v. *Martz Chevrolet, Inc.,* 505 F.2d 968, 971 (7th Cir. 1974).

inconsistent with the admitted and invariable Board policy of refusing to count ballots on which only some mark on the back is reflected. Quite different pragmatic and philosophical values justify the latter policy of the Board. America's long experience with the use of paper ballots in state elections indicates the value of simple and sometimes somewhat arbitrary rules as to what is and what is not a valid ballot. Too great flexibility in these requirements leads to applications as variable as the different commissioners at the different elections, as well as to election disputes following every close election.

Further, we know from this experience that the intended value of secrecy of the ballot may be greatly damaged if unique or aberrational markings are permissible for a valid ballot. With regard to the present case, for instance, a voter doubted by the side to which he had indicated his vote (who may indeed have intended to vote contrary to his indication) could be asked in advance of the election to demonstrate his loyalty to employer or union by marking "No" or "Yes" on the back of the folded (and intended to be secret) ballot —thus permitting verification by the promisee of the voter's promise, coerced or not, either by observation at the time of casting the ballot or else upon the count itself.

Quite proper concerns in the proper administration of an election—hardly inconsistent with counting as valid an irregular marking on the face of the ballot—justify a fixed and impartial rule that no markings on the back of the folded ballot can count as a valid vote. One might, of course, say it is not an unreasonable rule that henceforth commissioners must look at both front and back of a ballot (but what if there are markings on both front and back, the latter possibly added by a stranger to spoil the ballot?)

However, I certainly cannot hold that the Board is unreasonable or arbitrary in requiring that a ballot be marked on its face, in the space intended for voting, rather than on its folded back—a requirement, I am almost certain, that has applied in almost all American jurisdictions in which paper ballots have been used since the founding of our Republic. The Board's concerns for facile and fair administration of an

election count should not be at judicial whim discarded as arbitrary or unreasonable; nor the Board's concern with possible further litigable issues that may thus arise by the judicially mandated flexibility in casting valid ballots.[2]

In *Roberts Door and Window Company v. N.L.R.B.*, 540 F.2d 350 (1976), the Eighth Circuit followed our *Titche-Goettinger* rationale. The dissenting judge expressed what I believe to be the more sound view:

* * * The manner in which and the regulations by which an election is to be conducted are within the competence of the Board to provide. *Semi-Steel Casting Co. v. National Labor Relations Bd.*, 160 F.2d 388, 391–392 (8th Cir.), *cert. denied*, 332 U.S. 758, 68 S.Ct. 57, 92 L.Ed. 344 (1947). Courts should not interfere save for the most glaring discrimination or abuse. *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (2nd Cir. 1970), *cert. denied*, 401 U.S. 954, 91 S.Ct. 966, 28 L.Ed.2d 237 (1971).

The Board did not abuse its discretion here. Its actions were completely consistent with the principles of majority rule, secrecy of the ballot and fairness. The Board has, since 1951, uniformly refused to count ballots not marked on their face. *Western Electric Company, Inc.*, 97 NLRB 933, 934, 29 LRRM 1187 (1951). It has done so whether the markings on the reverse side of the ballot appeared to favor the employer or the Union.

The Board's reasons for adopting this practice are sound. Such ballots raise doubts "whether [the voter] was even aware of the instructions, or indeed, of the choices set forth on the face of the ballot;" they "create the possibility that the voter intended to insure that one of the parties to the election finds out how he voted;" and they make for greater

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[2] For example, there may be markings on the back of a folded blank ballot, such as "O.K.", "right on", "the union is good", "the company is good". Should the (alleged) voter who made this marking be permitted to explain later that he intended by this to vote "Yes" or "No" (or, rather, to place his "X" in the "Yes" or "No" space) on the ballot itself?

difficulties in counting the ballots and for more challenges. *Columbus Nursing Home, Inc.*, 188 NLRB 825, 76 LRRM 1417, 1418 (1971). * * *

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2983

October 28, 1980

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MANHATTAN CORPORATION,
MANHATTAN GUEST HOUSE, INC., RESPONDENT

Application for Enforcement of an Order of the
National Labor Relations Board

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 23, 1980, 5 Cir., 197___, _____ F.2d _____).

Before TUTTLE, RANDALL, and TATE, *Circuit Judges.*

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

(X) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rul 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____

CAROLYN DINEEN RANDALL
United States Circuit Judge

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 15–CA–7217

MANHATTAN CORPORATION,
MANHATTAN GUEST HOUSE, INC.

and

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL NO. 275, AFL–CIO

DECISION AND ORDER

Upon a charge filed on March 1, 1979, by Service Employees International Union, Local No. 275, AFL-CIO, herein called the Union, and duly served on Manhattan Corporation, Manhattan Guest House, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 15, issued a complaint and notice of hearing on March 16, 1979, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on January 26, 1979, following a Board election in Case 15–RC–6305 the Union was duly certified as the exclusive collective-bargaining representative of

Respondent's employees in the unit found appropriate;[1] and that, commencing on or about February 26, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 28, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On April 5, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 11, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed no response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits its refusal to bargain but attacks the Union's certification on the basis that the Board erred in certifying the Union as the exclusive collective-bargaining representative of Respondent's employees in the appropriate unit. In his Motion for Sum-

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[1] Official notice is taken of the record in the representation proceeding, Case 15–RC–6305, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C.Va., 1957); *Follett Corp.*, 164 NLRB 38 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

mary Judgment, counsel for the General Counsel alleges that Respondent seeks to relitigate issues previously considered in the underlying representation case and that there are no factual issues warranting a hearing.

Our review of the record herein, including the record in Case 15–RC–6305, discloses, *inter alia*, that pursuant to a Stipulation for Certification Upon Consent Election an election was conducted among the employees in the stipulated unit on June 23, 1978, and that the tally of ballots furnished the parties after the election showed 43 votes cast for, and 42 against, the Union. There were five challenged ballots and three void ballots, a sufficient number to affect the results. Respondent filed timely objections which alleged in substance that the Board agent conducting the election voided three ballots which should have been counted. Two of the disputed ballots had no markings on their faces, but were marked with an "X" on the blank reverse side. The third disputed ballot had no markings on its face, but had the word "NO" written on the blank reverse side. Respondent contended that these ballots should have been counted as clear manifestations of the voters' intent. After investigation, the Acting Regional Director on August 16, 1978, issued his Report on Objections and Challenged Ballots to the Board in which he recommended that the objections be overruled and that two of the challenges be sustained. In accordance with the stipulation of all parties, the challenges to the remaining three ballots were sustained.

On August 30, 1978, Respondent filed exceptions to the Acting Regional Director's report in which it essentially reiterated the allegations and contentions set forth in its objections and in which it cited additional authority in support thereof. On January 26, 1979, the Board issued a Decision and Certification of Representation[2] adopting the Acting Regional Director's report and recommendations.[3]

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[2]240 NLRB No. 6.

[3]Member Murphy, dissenting, would have counted the ballot marked "NO" on the back as a clear manifestation of the voter's intent.

On January 31, 1979, the Union, by letter, requested, and is continuing to request, Respondent to recognize the Union and to meet and bargain collectively and to provide the Union with information for the purpose of commencing collective-bargaining negotiations.[4] In its answer to the complaint, Respondent admits that it has refused and is continuing to refuse to recognize the Union, to meet and bargain collectively with the Union, and to provide the Union with relevant information for the purpose of collective bargaining in order to test the certification of the Union as the exclusive collective-bargaining representative of its employees. It thus appears that Respondent is attempting to raise herein issues which were raised in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

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[4]This information includes the names, addresses, wage rates, and fringe benefits of Respondent's employees.

[5]See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Findings of Fact

I. THE BUSINESS OF RESPONDENT

Respondent, a Louisiana corporation, is engaged in the health care of the elderly. During the past 12 months, a representative period, Respondent, in the course and conduct of its business operations, received gross revenues in excess of $100,000. During the same period of time Respondent purchased supplies and materials valued in excess of $10,000 which were shipped directly to said facilities from points located outside the State of Louisiana.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Service Employees International Union, Local No. 275, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time licensed practical nurses, nurses aides, housekeeping employees, dietary employees, laundry employees and groundsmen; excluding all professional employees, confidential secretary, watchmen, guards and supervisors as defined in the Act.

2. The certification

On June 23, 1978, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 15, des-

ignated the Union as the representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on January 26, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 31, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 26, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit, and to furnish the Union with the information requested by it.

Accordingly, we find that Respondent has, since February 26, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Sec-

tion 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Manhattan Corporation, Manhattan Guest House, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Service Employees International Union, Local No. 275, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time licensed practical nurses, nurses aides, housekeeping employees, dietary employees, laundry employees and groundsmen; excluding all professional employees, confidential secretary, watchman, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 26, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 26, 1979, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, and to furnish it information relevant for the purpose of collective bargaining, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Manhattan Corporation, Manhattan Guest House, Inc., Harvey, Louisiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service Employees International Union, Local No. 275, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time licensed practical nurses, nurses aides, housekeeping employees, dietary employees, laundry employees and groundsmen; excluding all professional employees, confidential secretary, watchman, guards and supervisors as defined in the Act.

(b) Refusing to furnish the above-named labor organiza-

tion with information relevant and necessary for the purpose of collective bargaining.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Upon request, provide the above-named labor organization with information relevant and necessary for the purpose of collective bargaining.

(c) Post at its Manhattan Boulevard, Harvey, Louisiana, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated. Washington, D.C. June 13, 1979

/s/ _____
JOHN H. FANNING,
Chairman

/s/ _____
HOWARD JENKINS, JR.,
Member

/s/ _____
JOHN C. TRUESDALE,
Member

National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service Employees International Union, Local No. 275, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT refuse to supply information requested by the Union which is relevant and necessary for the purpose of collective bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time licensed practical nurses, nurses aides, housekeeping employees, dietary employees, laundry employees and groundsmen; excluding all professional employees, confidential secretary, watchmen, guards and supervisors as defined in the Act.

MANHATTAN CORPORATION, MANHATTAN GUEST HOUSE, INC.
(Employer)

Dated _____ by _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Plaza Tower, Room 2700, 1001 Howard Avenue, New Orleans, Lousiana 70113, Telephone 504–589–6389.

APPENDIX D

Manhattan Corporation, Manhattan Guest House, Inc. *and* Service Employees International Union, Local 275, AFL-CIO, Petitioner, Case 15–RC–6305.

January 26, 1979

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY MEMBERS JENKINS, MURPHY, AND TRUESDALE

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to and determinative challenges in an election held on June 23, 1978,[1] and the Acting Regional Director's report recommending disposition of the same. The Board has reviewed the record in light of the Employer's exceptions[2] and hereby adopts the Acting Regional Director's findings and recommendations.

The Employer's objections allege, in substance, that the Board agents conducting the election voided three ballots which should have been counted. Two of the disputed ballots had no markings on their faces, but were marked with an "X" on the blank reverse side. The third disputed ballot had no markings on its face, but had the word "NO" written on the blank reverse side. The Acting Regional Director, citing, *inter alia*, *Columbus Nursing Home, Inc.*, 188 NLRB 825

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[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was 43 for, and 42 against, the Petitioner, with 5 challenged ballots, a sufficient number to affect the results of the election. Three ballots were declared void.

[2] In the absence of exceptions thereto, we adopt, *pro forma*, the Acting Regional Director's recommendation that the challenges to the ballots of Maria Hansen and Annie St. Amand be sustained. Additionally, in accordance with the stipulation of all parties, the challenges to the ballots of Irma Wilson, Georgene Burt, and Bernice Fox are sustained.

(1971), and *Staco, Inc.*, 234 NLRB 593 (1978), concluded that the Board agents acted properly in voiding the improperly marked ballots. He therefore recommended that the objections be overruled. The Employer has excepted to the Acting Regional Director's recommendation and, essentially, urges the Board to reconsider its stated policy in light of the decisions by certain United States Circuit Courts of Appeals.[3]

We agree with the Acting Regional Director that the two disputed ballots marked "X" on the reverse side should be declared void. In addition, contrary to our dissenting colleague, for reasons set forth more fully in *Columbus Nursing Home, Inc., supra*, and our recent decision in *Staco, Inc., supra*, we agree that the third ballot in dispute, marked on the blank side with the word "NO," should also be declared void. As we stated in *Columbus Nursing Home, Inc.*:

> It is the policy of the Board to count irregularly marked ballots whenever the intent of the voter is clearly apparent. However, where, as here, a ballot contains no markings on its face, any conclusion drawn about the voter's intent based on markings on the back of the ballot must be almost entirely speculative. Rather than engage in such speculation, the Board has, since 1951, followed a policy of invalidating ballots marked in a manner so radically different from the normal method of marking ballots.[4]

Consequently, we respectfully adhere to our position, as most recently expressed in *Staco, Inc., supra*, notwithstanding contrary decisions of courts of appeals, until such time as the United States Supreme Court has passed on the matter. Accordingly, we find the disputed ballots void and overrule the Employer's objections in their entirety.

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[3] *Roberts Door and Window Company* v. *N.L.R.B.*, 540 F.2d 350 (8th Cir. 1976); *N.L.R.B.* v. *Tobacco Processors, Incorporated*, 456 F.2d 248 (4th Cir. 1972); *N.L.R.B.* v. *Titche-Goettinger Company*, 433 F.2d 1045 (5th Cir. 1970).

[4] 188 NLRB at 825.

We note that our dissenting colleague agrees with the Acting Regional Director's finding that the "X" ballots are void, but would count the "NO" ballot as a valid "no" vote. In so finding, our colleague concludes that the latter ballot clearly expresses the voter's intent. As we discussed at length in *Staco, Inc., supra,* we would not consider any ballots so improperly marked in order to determine the intent of the voter who cast the ballot. Were we to reach the question of voter intent, however, it appears that the differing positions taken by our colleague on the two types of improperly marked ballots are inconsistent with each other. For, we do not see how the ballot marked "NO" on the back more clearly expresses the voter's intent than the ballots marked on the back with an "X" in the position such that the "X" would appear with the "NO" square on the face of the ballots. Arguably, the word "NO" written on the back of the ballot may indicate a voter's desire to vote "NO" or not to vote at all. It is precisely this type of speculation and argument that compels us to avoid trying to determine intent from markings on the back of a ballot, which in any event reveal that the voter was acting contrary to or in ignorance of the instructions on its face.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Service Employees International Union, Local 275, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the said labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All full-time and regular part-time licensed practical nurses, nurses aides, housekeeping employees, dietary employees, laundry employees, and groundsmen, excluding all professional employees, confidential secretary, watchman, guards, and supervisors as defined in the Act.

Member Murphy, dissenting in part:

I agree with my colleagues' decision to adopt the findings and recommendations of the Acting Regional Director in all respects except as to his recommendation to void the ballot marked on the back with the word "NO." Contrary to the majority, and for the reasons set forth in my dissent in *Staco, Inc.*, 234 NLRB 593 (1978), I find that this manner of marking ballots, while not in compliance with the instructions on the ballot, clearly reveals the voter's choice. Unlike the situation where the ballots are marked on the back with an "X" and where the Board can only speculate as to the voter's intention, I find the ballot with the word "NO" written on the back to be a clear manifestation of the voter's intention not to be represented by the Union. In such a situation, there is no need for the Board to speculate as to the voter's choice. I would therefore find the ballot marked on the back with the word "NO" to be a valid ballot. As the resulting revised tally would not give Petitioner a majority of the valid votes cast, I would issue a certification of results.

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 15–RC–6305

MANHATTAN CORPORATION
MANHATTAN GUEST HOUSE, INC., EMPLOYER

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 275, AFL–CIO, PETITIONER

REPORT ON OBJECTIONS AND CHALLENGED BALLOTS

Pursuant to a Stipulation for Certification upon Consent Election approved June 9, 1978, by the Acting Regional Director of the Fifteenth Region of the National Labor Relations Board, an election was conducted on June 23, 1978, among certain employees of Manhattan Corporation, Manhattan Guest House, Inc. (herein called the Employer), at its Harvey, Lousiana, locations, to determine whether the employees desired to be represented for the purposes of collective bargaining by Service Employees International Union, Local 275, AFL-CIO (herein called Petitioner). The Tally of Ballots served upon the parties immediately following the election disclosed the following results:

Approximate number of eligible voters	106
Void ballots	3
Votes cast for Petitioner	43
Votes cast against participating labor organization	42
Valid votes counted	85
Challenged ballots	5
Valid votes counted	85
Challenged ballots	5
Valid votes counted plus challenged ballots	90

The challenges were sufficient in number to affect the results of the election.

On June 30, 1978, the Employer timely filed "Postelection Objections" to conduct affecting the results of the election, a copy of which was duly served upon the Petitioner. The objections are attached hereto and made a part hereof as Attachment A.

Pursuant to Section 102.69(c) of the Board's Rules and Regulations, Series 8, as amended, an investigation of the objections and the challenged ballots has been conducted, during which all the parties were afforded the opportunity to submit evidence bearing upon the issues. The undersigned, having duly considered the results thereof, reports and recommends thereon as follows:

THE CHALLENGED BALLOTS

The ballot of *Maria Hansen* was challenged by the Board Agent who conducted the election because Hansen's name failed to appear on the eligibility list furnished by the Employer.

The investigation disclosed Hansen was hired by the Employer on February 16, 1978, as a nurse's aide. Hansen failed to attend a mandatory staff meeting April 24, 1978, and was terminated on April 25, 1978, for this reason. Her termination took place on May 17, 1978, approximately three weeks prior to the filing of the petition in the subject case. No unfair labor practice charges were filed based upon her termination.

Based on the preceding, the undersigned concludes and recommends that Maria Hansen, at all times material, was not employed by the Employer and was ineligible to vote in the election. Accordingly it is recommended that the challenge to the ballot of *Maria Hansen* be sustained.

The ballot of *Annie St. Amand* was challenged by the Board Agent who conducted the election because her name failed to appear on the eligibility list. St. Amand served as one of the Petitioner's observers during the election.

The investigation discloses St. Amand was employed by the Employer from December 8, 1977, until May 9, 1978, when she was terminated. Unfair labor practice charges alleging that St. Amand's termination violated the Act were filed by the Petitioner. Investigation of the charge disclosed that St. Amand was terminated for just cause and the charge was dismissed on June 28, 1978. After dismissal, no appeal was filed by the Petitioner and the case was closed July 12, 1978.

Based on the preceding, the undersigned concludes and recommends that at all times material, Annie St. Amand was not employed by the Employer and therefore was ineligible to vote in the election. Accordingly, it is recommended that the challenge to the ballot of *Annie St. Amand* be sustained.

The ballots of *Irma Wilson*, *Georgene Burt*, and *Bernice Fox* were challenged by the Employer on the grounds that these individuals were employed in a classification not within the unit. The investigation disclosed Wilson, Burt, and Fox are employed as ward clerks.[1]

THE OBJECTIONS

Objections Nos. 1 through 7:

To facilitate reporting, these objections, which are related, have been consolidated by the undersigned. In sub-

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[1]The parties have entered into a Stipulation that at all times material herein, *Irma Wilson*, *Georgene Burt*, and *Bernice Fox*, were employed as ward clerks, a classification not within the bargaining unit agreed upon between the parties. It was additionally stipulated that challenges to the ballots of Wilson, Burt, and Fox be sustained. All parties expressly waived the issuance of the Regional Director's report on challenged ballots with respect to the individuals named above, the right to file exceptions thereto, and any and all further proceedings related thereto, as provided in Section 102.69 of the Board's Rules and Regulations, Series 8, as amended. The undersigned has approved the aforementioned Stipulation of the parties. Accordingly, the challenges to the ballots of *Wilson*, *Burt*, and *Fox* are sustained.

stance, the objections allege that the Board Agents conducting the election voided three ballots which should have been counted. The objections further allege that the ballots were folded when presented to the voter by the Board Agents who gave no verbal instructions to the voter to open the ballot, and that the majority of the voters in said election were persons of very limited education.

The Employer named two employees who allegedly notified their supervisor they were two of the three employees who marked their ballot on the reverse side. One of these two employees was on vacation and not available for interview during the investigation. The other employees, [*sic*], Witness A, gave an affidavit to the Board Agent assigned to conduct the investigation herein.

Two of the ballots in question were marked on the back with an "X" and the third ballot was marked on the back with the word "NO".

Witness A states in her affidavit that before the election, she saw the Board's Notice of Election posted at the Employer's place of business and read the notice. She further states "I also read the part of the notice where it shows the sample ballot. Still when the Board Agent gave me the ballot, I did not open [it] and marked my ballot on the outside of it. When I marked it I put an X on the outside of the ballot." Witness A then deposited her ballot in the ballot box. The witness further states "The reason I did not open it was that I wasn't informed that I was supposed to open it." Witness A has three years education at the university level, majoring in elementary education.

Although the Board Agents handed out prefolded ballots to the voters, the observers voiced no objection to this procedure. There was no evidence produced, or discovered, that any voter was confused or did not understand the voting method. The Employer's observers each state that at their respective polling area, none of the voters asked for instructions from the Board Agents as to the voting procedure. Additionally, there was no evidence that either of the two Board Agents conducting the election gave wrong, or confusing instructions to the voters. In the absence of indica-

tions of confusion, or of lack of understanding of the voting procedure, Board Agents are not required to explain the balloting procedure to the voters, although upon request, or upon their own initiative, Board Agents do at times explain the balloting process. The investigation also disclosed that copies of the Notice of Election were posted at the Employer's premises prior to the election in places where all eligible voters could read them.[2]

In *Columbus Nursing Home, Inc.*, 188 NLRB 825, the Board stated its policy as follows:

> It is the policy of the Board to count irregularly marked ballots whenever the intent of the voter is clearly apparent. However, where, as here, a ballot contains no markings on its face, any conclusion drawn about the voter's intent based on the markings on the back of the ballot must be almost entirely speculative. Rather than engage in such speculation, it is Board policy to invalidate ballots marked in a manner so radically different from the normal manner of marking ballots.

Therefore, the undersigned concludes and recommends the Board Agents properly voided the ballots in question.[3] For the reasons set forth herein, it is recommended that Employer's Objections Nos. 1 through 7 be overruled.

SUMMARY AND RECOMMENDATIONS[4]

For the reasons hereinabove set forth, the undersigned finds that *Maria Henson* and *Annie St. Amand* at all times

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[2] A reproduced sample ballot is an integral part of the Notice of Election.

[3] To the extent that this finding is in conflict with the decision of the U.S. Court of Appeals for the Fifth Circuit in *N.L.R.B.* v. *Titche-Goettinger Company*, 433 F.2d 1045 (cited by Employer's counsel in support of the objections) the Board has respectfully disagreed and adheres to its view that until such time as the U.S. Supreme Court has passed on the matter, ballots marked on the reverse side are void. (See *Columbus Nursing Home, Inc., supra*, Fn.4, at 826; *Staco, Inc.* 234 NLRB 101.

[4] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the

material herein were not eligible to vote in the election, and it is therefore recommended that the challenges to their ballots be sustained.

The undersigned further recommends that Employer's Objections Nos. 1 through 7 raise no substantial or material issues with respect to the election or the conduct thereof, and should be overruled.

It is further recommended that Petitioner, having received a majority of the valid ballots cast in the election, be duly certified in the following unit:

Included: All full-time and regular part-time licensed practical nurses, nurse's aides, housekeeping employees, dietary employees, laundry employees, and groundsmen.

Excluded: All professional employees, confidential secretary, watchman, guards, and supervisors as defined in the Act.

Dated at New Orleans, Louisiana, this 16th day of August, 1978.

/s/ _____

FRED A. LEWIS
Acting Regional Director, Region 15
National Labor Relations Board
Suite 2700, Plaza Tower Building
1001 Howard Avenue
New Orleans, Louisiana 70113

Board in Washington, D.C. Exceptions must be received by the Board in Washington no later than August 29, 1978.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-2983

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

MANHATTAN CORPORATION,
MANHATTAN GUEST HOUSE, INC.,
RESPONDENT.

JUDGMENT

Before: TUTTLE, RANDALL and TATE, Circuit Judges.

On June 23, 1980, being fully advised in the premises, the Court handed down its decision denying eonforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged that the enforcement of the said order of the National Labor Relations Board be denied.

Costs are taxed against petitioner.

FILED: June 23, 1980

TATE, Circuit Judge, concurring.

NO. _____

Office-Supreme Court, U.S.
FILED
MAY 14 1981
ALEXANDER L. STEVAS,
CLERK

80-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
Petitioner

VERSUS

MANHATTAN CORPORATION,
MANHATTAN GUEST HOUSE, INC.
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ONEBANE, DONOHOE, BERNARD, TORIAN, DIAZ, McNAMARA & ABELL
(A Professional Law Corporation)

By: ROBERT W. DAIGLE
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QUESTION PRESENTED

Whether, in adopting and applying a uniform rule that ballots marked only on the back shall be deemed void, the National Labor Relations Board reasonably exercised its discretion to establish procedures for conducting representation elections in light of acknowledged Board policy to allow a ballot if there is a clear expression of preference, regardless of the irregularity of the mark on the ballot.

LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Manhattan Corporation and Manhattan Guest House, Inc. are currently leasing their facilities to Health Care Management, Inc. Health Care Management, Inc. is a wholly owned subsidiary of ARA Services.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
Petitioner

VERSUS

MANHATTAN CORPORATION,
MANHATTAN GUEST HOUSE, INC.
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

On June 23, 1978, a representation election was held. A total of 93 ballots were cast, 43 in favor of the Union, 42 against, 5 challenged. (J.A. 26a) The three remaining ballots were voided by the Board Agent on grounds that they were marked irregularly. Of the three voided ballots, two of the ballots had no markings on their printed side but were marked with an "X" on the blank reverse side such that the "X" would appear in the "NO" square on the face of the ballots. The remaining ballot had no marking on its printed side but had the word "NO" written on the blank reverse side. (J.A. 22a, 24a) The ballots were folded when handed to the employees with

only the blank portion thereof visible. (J.A. 29a)

Respondent filed objections to the conduct of the election alleging that the three ballots voided by the Board evidenced a clear manifestation of voter intent and should have been counted. The Board's Acting Regional Director recommended that Respondent's objections be overruled and that the challenges to two of the ballots be sustained. (J.A. 31a) The challenges to the three remaining ballots were sustained in accordance with a stipulation entered into by Respondent and the Union. (J.A. 28a) Respondent filed exceptions to the Regional Director's report and on January 26, 1979 the Board, with Member Murphy dissenting, issued a Decision and Certification of Representative adopting the Regional Director's recommendations that Respondent's objections be overruled, and certified the Union. (J.A. 24a, 25a)

Respondent refused to bargain with the Union thus precipitating an unfair labor practice complaint duly answered by Respondent. Thereafter, General Counsel for the Board filed a motion for summary judgment and the Board issued an order transferring the proceeding to the Board. The motion for summary judgment was granted. (J.A. 10a - 21a)

The Fifth Circuit Court of Appeals denied enforcement of the Board's order relying on its decision in *N.L.R.B. vs. Titche-Goettinger Company*, 433 F. 2d 1045 (5th Cir. 1970). There the Court held that the Board's practice of voiding ballots marked only on the reverse side is inconsistent with the Board's general policy of allowing a ballot if there is a clear expression of voter preference, regardless of the irregularity of the mark on the ballot. (J.A. 2a - 3a)

ARGUMENT

The Board asks this Court to grant certiorari on the basis that the Fifth Circuit's decision below infringes upon the broad discretion entrusted to the Board in establishing and implementing rules governing representation elections, and that it therefore constitutes a "serious departure" from well-established principles propounded by this Court. That the Board has been accorded broad discretion is unquestionable. However, that this discretion is subject to judicial scrutiny and that it is not absolute is equally unquestionable.

> Courts should be "slow to overturn an administrative decision," . . ., but they are not left "to 'sheer acceptance' of the Board's conclusions," . . . . Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.

N.L.R.B. v. Brown, 380 U.S. 278, at 291-2 (1965).

The Fifth Circuit's decision below is totally consistent with the above-stated principle in *Brown*, which delineates the circumstances under which federal courts may and, indeed, ***should*** intervene in administrative determinations.

Further militating against the granting of the petition sought is the soundness of the Fifth Circuit's decision, when one considers the Board rule at issue. Acknowledged Board policy is to count a ballot (1) if there is a clear expression of voter preference, and (2) so long as the mark on the ballot does not

identify the voter, regardless of the irregularity of the mark. *Knapp-Sherril Co.*, 171 N.L.R.B. 1547 (1968). In attempting to support its automatic exclusion of all ballots marked only on the reverse side, the Board argues that these ballots meet neither of the two requirements.

First, the Board contends that a ballot marked only on the reverse side requires the exercise of complete speculation to ascertain voter intent. This contention is specious. Suppose the voter had written "No, I do not want a union" across the reverse side of the ballot. Does there exist a clearer indicia of voter intent? The Board has counted ballots which give rise to greater speculation. *E. g., Abtex Beverage Corp.*, 237 N.L.R.B. 1271 (1978) (Board counted ballot with "X" in both "YES" and "NO" squares where marking in "NO" square had been written over with circular markings); *J.L.P. Vending Company, Inc.*, 218 N.L.R.B. 794 (1975) (Board counted ballot that contained attempted erasure of line in "NO" box and a heavier line in "YES" box).

Next, the Board contends that the reverse side markings provide a means for identifying the voter and therefore violate ballot secrecy. This contention is equally unpersuasive. Marking the word "NO" or the letter "X" on the blank side of the ballot provides no greater means for voter identification than do the ballot markings approved by the Board in earlier decisions. *E. g., N.L.R.B. v. Sauk Valley Manufacturing Company, Inc.*, 486 F. 2d 1127 (9th Cir. 1973) (Board counted two ballots which were marked with the Spanish word "si" in the "YES, SI" box rather than by an "X"); *Western Electric Company, Inc.*, 97 N.L.R.B. 901 (1951) (Board counted (1) ballot with word "yes" above square under petitioner's name and with square blackened, (2) ballot with word "yes" written on each side of the petitioner's square and with an "X" in petitioner's square, (3) ballot with "CIO" written in the petitioner's square, and (4) ballot with an oblique line in the petitioner's square.);

F.J. Stokes Corp., 117 N.L.R.B. 951 (1957) (Board counted two ballots marked respectively (1) with an "X" in the "NO" square and "HELL" to the right, and (2) with an "X" in the "NO" square and "Hell No" to the right. It is worthy of mention that the Board does not suggest that the disputed markings in the instant case were used for identification purposes.

The validity of a ballot marked only on the reverse side is not a novel question in the federal judiciary. Four decisions emanating from three federal judicial circuits resolved this issue prior to the decision of the court below. *N.L.R.B. v. Wrape Forest Industries*, 596 F. 2d 817 (8th Cir. 1979); *Roberts Door & Window Co. v. N.L.R.B.*, 540 F. 2d 350, (8th Cir. 1976); *N.L.R.B. v. Tobacco Processors, Inc.*, 456 F. 2d 248, (4th Cir. 1972); *N.L.R.B. v. Titche-Goettinger Co.*, *supra*. In each case the Court was presented with the identical issue raised by the Board herein. In each case the issue was resolved against the Board. Here, the Court below gave full consideration to the issue raised before this Court and decided it correctly in accordance with an unbroken line of authority.

The Board in its petition would have this Court believe that at stake here is the continued viability of established principles respecting the Board's authority to enact rules governing representation elections. The Board has exaggerated the importance of this case. This case presents no challenge to such principles. What is presented is the question of Board authority to create an irrebutable presumption that every ballot marked on the reverse side makes ascertaining voter intent impossible and inherently identifies the voter marking such ballot. As noted above, every circuit that has considered this Board policy has found it to be unsupportable and has exercised its proper authority to reject the policy. *N.L.R.B. v. Brown*, *supra*. Such an arbitrary and unreasonable policy is not worthy of judicial sanction, nor is it worthy of this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the respondent's brief in connection with the above and foregoing has this day been served by first class mail upon the following counsel at the address listed below:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D. C. 20530

This 15th day of May, 1981.

Joseph Onebane

JOSEPH ONEBANE